

BUSINESS LAW INSIGHT: WHAT A BUSINESS CAN LEARN FROM TRIAL - A LITIGATOR'S PERSPECTIVE

Business litigation and trial attorneys get a firsthand, postmortem, Monday morning quarterback view of a corporate client's business practices. More often than not, a trial attorney will spend a significant part of his or her time attempting to explain a seemingly mundane business practice that becomes a red-herring that threatens the client's litigation goals.

Simple modifications to everyday business practices – made before a dispute has arisen - can save any business unnecessary headache during a dispute or litigation. These modifications are easy to incorporate into a business's everyday practice, even for small to mid-size companies. While we do not recommend a “sky is falling” approach, disputes and even litigation are often inevitable.

Here are some examples of effective business practice modifications to implement now; they are small but important changes your business can make that will be worth their weight in gold if your business finds itself in litigation:

- **Protect the privilege:** Thanks to the attorney-client privilege, a business's communications with its attorneys are protected from disclosure. However, the privilege may not apply when third parties are included in communications between a business and its attorney (even if those third parties are the business's other trusted advisors, such as accountants). To prevent waiver of the attorney-client privilege, do not copy or include any other person on communications between your business and its attorney.
- **Treat your business like a business:** The alter ego doctrine is a powerful tool for an enemy to use to hold corporate owners personally liable. In order to avoid an adversary piercing the corporate veil, your business should observe corporate formalities, hold regular corporate meetings (and document them), and not use corporate bank accounts for personal expenses (or personal bank accounts for corporate expenses). Keep an eye on employees who may not understand or care about the distinction and make it your business's standard practice to maintain corporate formalities.
- **Titles matter:** Businesses sometimes allow employees to select or alter their titles. However, titles (particularly a director, officer or manager title) may have unintended implications, such as making the business liable for an employee's misconduct. Employees should have titles that accurately reflect their job duties and responsibilities.
- **For business, use your business email:** Sometimes it is just more convenient to use whatever email account you have open on your smart phone, rather than logging into your business email. However, a jury may be suspicious of business-related emails sent from

personal accounts. We have seen lawyers argue that the use of a personal account to send a business-related email raised the possibility that the employee who sent the email was acting nefariously (when, in reality, it had simply been a matter of convenience). Use business email for all business-related matters (and, conversely, use personal email for all personal matters).

These simple business practice modifications will help your business in the event that a dispute or litigation arises. For advice regarding business disputes, litigation, trial or alternative dispute resolution, please contact one of the members of Hoge Fenton's Litigation Practice Group.

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The Fine Print.

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- Alison P. Buchanan